IN THE

Supreme Court of the United States

October Term, 1951

No. 533

WALTER H. FORTNEY, ET AL., *Petitioners*

v.

GENERAL FINANCE CORPORATION

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

WALTER J. CUMMINGS
THOMAS E. CONLEY, III

INDEX

	Page
Opinions below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement	3
Reasons for Granting the Writ	8
Conclusion	21

CITATIONS.

CASES:

Aeronautical Industrial Lodge v. Campbell, 337 U. S. 521 ..... 11, 14
Arnstein v. Porter, 154 F. 2d 464 13
Brown v. Watt Car & Wheel Co., 182 F. 2d 570, cert. den. 340 U. S. 875 ..... 17, 18
Colby v. Klune, 178 F. 2d 872 13
Conner v. Pennsylvania R. R., 177 F. 2d 854 ..... 17, 18
Dougherty v. General Motors Corporation, 176 F. 2d 561, cert. den. 338 U. S. 956 ..... 17, 18
Dwyer v. Crosby Co., 167 F. 2d 567 18
Farrell v. District of Columbia Amateur Athletic Union, 153 F. 2d 647 13
Fishgold v. Sullivan Drydock Corp., 328 U. S. 275 ..... 11, 14
Garrett Biblical Institute v. American University, 163 F. 2d 265 ..... 13, 14
Ganweiler v. Elastic Stop-Nut Co., 162 F. 2d 448 17
Gregory v. Louisville & N. R. Co., 191 F. 2d 856 ..... 16, 18
Haynes v. Cincinnati, N. O. & T. P. Ry., 338 U. S. 278. 15
Lesher v. P. R. Mallory Co., 166 F. 2d 983 ..... 17, 18
MacLaughlin v. Union Switch & Signal Co., 166 F. 2d 46 ..... 17, 18
Mentzel v. Diamond, 167 F. 2d 299 ..... 17, 18
Morris v. Chesapeake & O. Ry., 171 F. 2d 579 ..... 16, 18
Neal v. General Motors Corporation, Civil No. 6053, E. D. Mich., Southern Div. 9
Nevins v. Curtiss-Wright Corp., 172 F. 2d 535 17

Page

Oakley v. Louisville & N. R. Co., 338 U. S. 278.....15, 20
Same, after remand, 20 Labor Cases (CCH) ¶ 66,132 . . . .16, 18
Payne v. Wright Aeronautical Corp., 162 F. 2d 549.17, 18
Piantadosi v. Loew's, Inc., 137 F. 2d 534..... 14
Raulins v. Memphis Union Station, 168 F. 2d 466...16, 18
Rudisill v. Chesapeake & O. Ry. Co., 167 F. 2d 175.. 17
Sartor v. Arkansas Gas Corp., 321 U. S. 620..... 13
Seattle Star v. Randolph, 168 F. 2d 274.....17, 18
Siaskewicz v. General Electric Co., 166 F. 2d 463.... 18
Trailmobile Co. v. Whirls, 331 U. S. 40.....11, 14

STATUTES:

Selective Training and Service Act of 1940, Section 8, 54 Stat. 890, as amended, 50 U. S. C. App. 308.. 19
Selective Service Act of 1948, Section 9, 62 Stat. 604, 50 U. S. C. App. 459 .....8, 15
Service Extension Act of 1941, Section 7, 55 Stat. 627, 50 U. S. C. App. 357 8
Universal Military Training and Service Act, 1951 Amendments, Section 1(s), 65 Stat. 86, 50 U. S. C. Supp. IV App. 459.....8, 16

MISCELLANEOUS:

Rule 56, Federal Rules of Civil Procedure 12
Senate Report No. 1268, 80th Cong. 2d Sess. (1948), P. 15, 16 .....15, 16
Hearings on H. R. 1752, 82d Cong., 2d Sess., p. 17... 20
Congressional Record 21
Secretary of Labor, Annual Report (1950), P. 77, 78. 20
Bureau of National Affairs Special Survey, *Military Leave Policies of 500 Corporations* (October 1950), P. 7-8, 13, 16 21
National Industrial Conference Board, Studies in Personnel Policy, No. 114, *Company Military Leave Policies* (1951), P. 23-25 21
Pension Agreement between respondent and UAW-CIO, May 29, 1950, P. 25 21

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No.

WALTER H. FOSTER, ET AL., *Petitioners*

v.

GENERAL MOTORS CORPORATION.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

Walter H. Foster, Francis M. Bilbee and Narl W. Hedrick, on behalf of themselves and all their fellow-employees of General Motors Corporation similarly situated, pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered in the above case on October 17, 1951.

Opinions Below.

The summary judgment of the District Court for the Southern District of Indiana (R. 104) was not accompanied by an opinion. The opinion of the Court of Appeals (R. 108) is reported at 191 F. 2d 907.

Jurisdiction.

The judgment of the Court of Appeals was entered on October 17, 1951. (R. 119). The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented.

1. Whether discrimination against reemployed veterans, by penalizing many more of them and in much greater degree than any other group because of their absence in military service, is valid under Section 8 of the Selective Training and Service Act of 1940 because it is done through collective bargaining.

2. Whether summary judgment may be entered on an affidavit containing evidence of which the credibility and probative force are necessarily in question, when no opposing affidavit is offered.

3. Whether the above statute permits veterans to be penalized in their employment on account of their absence in military service because other employees on ordinary leaves of absence are penalized in the same way.

Statute Involved.

The pertinent portions of Section 8 of the Selective Training and Service Act of 1940, 54 Stat. 890, as amended, 50 U.S.C. Appendix 308, are as follows:

> (a) Any person inducted into the land or naval forces under this Act for training and service, who, in the judgment of those in authority over him, satisfactorily completes his period of training and service under Section 3(b) shall be entitled to a certificate to that effect upon the completion of such period of training and service, which shall include a record of any special proficiency or merit attained.
>
> • • • • • •
>
> (b) In the case of any such person who, in order to perform such training and service, has left or leaves a position, other than a temporary position, in the employ

of any employer, and who (1) receives such certificate, (2) is still qualified to perform the duties of such position, and (3) makes application for reemployment within ninety days after he is relieved from such training and service or from hospitalization continuing after discharge for a period of not more than one year—

* * * * * *

(B) if such position was in the employ of a private employer, such employer shall restore such person to such position or to a position of like seniority, status, and pay unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so;

* * * * * *

(c) Any person who is restored to a position in accordance with the provisions of paragraph (A) or (B) of subsection (b) shall be considered as having been on furlough or leave of absence during his period of training and service in the land or naval forces, shall be so restored without loss of seniority, shall be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted into such forces, and shall not be discharged from such position without cause within one year ofter such restoration.

Statement.

This is a class action by petitioners, employees of respondent, to enforce their veterans' reemployment rights under Section 8 of the Selective Training and Service Act of 1940, as amended, 50 U. S. C. App. 308 (hereafter called "the Act.") Petitioners claim vacation pay for the year 1946. They contend respondent denied it to them in violation of the Act by adopting a vacation pay provision peculiar to that year alone, which deprived nearly every veteran returning to respondent's employ of all or a great part of his vacation pay for that year. (R. 3, 52, 58)

Beginning with 1940, respondent has had in effect a vacation pay provision adopted annually through collective bargaining with the union (UAW-CIO) representing petitioners. These provisions granted 40 hours' pay to an employee with one year's seniority, provided he worked a single day at the end of the vacation year, which was July-June. (R. 43-49, 52-53). In 1942 and thereafter, for those with five years' seniority the amount was increased to 80 hours' pay. (R. 45) In 1943, 1944 and 1945, when the workweek was increased from five to six days, the vacation pay was raised correspondingly, from 40 and 80 hours to 48 and 96 hours (R. 46-48); it was decreased when the workweek dropped back to 40 hours in 1946. (R. 52) In substance, the provision was for one or two weeks' vacation pay for those with the appropriate seniority. Such provision has continued in effect unbrokenly to the present time—*except for 1946*, the year in dispute. (R. 43-49, 53-54) From time to time additions were made to this basic provision, and these additions in turn were modified or revoked, as shifting production or labor conditions seemed to require. (R. 45, 46, 47, 48, 53) Sometimes these additions or modifications were made through collective bargaining (R. 47, 53); sometimes they were imposed on respondent and the union by the War Labor Board (R. 45, 46, 48); but through it all, the basic provision remained unchanged: one week's pay for an employee with one year's seniority and two weeks' pay for an employee with five, provided he worked one day at the end of the vacation year.

Petitioners have the seniority needed to qualify for vacation pay; they have also met the requirement that they actually be at work one day at the end of the year, i. e. they worked during the last pay period in June, 1946. (R. 2, 6, 37) The class in whose behalf this action is brought are those veteran employees of respondent governed by the 1946 collective bargaining agreement here in issue who (a) returned to its employ between July 1, 1945 and June 30, 1946, (b) had one or more years' seniority on the latter

date, (c) worked at least part of the last pay period beginning in June, 1946, and (d) are entitled to reemployment in accordance with the provisions of Section 8 of the Act. (R. 1-3)

For 1946 (the vacation year July 1945—June 1946) the basic provision described above was revised. Instead of "40 (or 80) hours' pay," respondent and the union agreed that the amount of vacation pay should be "2% (or 4½%) of the employee's earnings in calendar 1945." (R. 52) The mass demobilization of our wartime army occurred, of course, in the period October 1945—May 1946, and the vast majority of respondent's veteran employees returned to respondent's employ very late in 1945 or in the first half of 1946. Because of this change in the method of computing 1946 vacation pay, in the words of the complaint "nearly every veteran returning to General Motors' employ was deprived of vacation pay in 1946 because of his prior absence in military service" (R. 3), for he had little or no 1945 earnings from which to figure 1946 vacation pay. The complaint charged that veterans were made "the victims of a unique rule discriminating against employees in the military service." (R. 3)

In 1947 and subsequent years, the former vacation provision was reinstated. (R. 3, 53)

Petitioners began discovery by serving interrogatories to procure evidence of the discriminatory operation and effects of the 1946 provision upon returning veterans. (R. 10-14) Respondent objected to the interrogatories on grounds of burdensomeness and irrelevance. (R. 15-20). Before a ruling on its objections, respondent moved for summary judgment. (R. 36)

To support its motion, respondent submitted two affidavits, one by Hoffman and one by Seaton. (R. 36, 39). Of the evidence in the affidavits, the only controversy here concerns paragraphs 31-40 of Seaton's affidavit, in which he describes the collective bargaining negotiations leading to adoption of the 1946 provision. (R. 49-52). The gist of

Seaton's evidence on this matter is that respondent's employees were on strike from November 21, 1945 to March 13, 1946, that in order to reduce vacation pay proportionately to the time lost in the strike respondent proposed that the amount of vacation pay be based on the employee's earnings during the vacation (fiscal) year, and that upon union insistence calendar year earnings were adopted as the base to lessen this reduction in vacation pay.[1]

Petitioners opposed decision of the discrimination issue by summary judgment, on two grounds. First; respondent's showing that the 1946 provision was agreed upon through collective bargaining did not rebut petitioners' allegation that in its effects and operation the provision discriminated against returning veterans. (R. 70, 76-79) Second: as an explanation that the provision was in no way directed against veterans, the credibility and probative force of arguments and reasons advanced in bargaining sessions are necessarily

---

[1] From this evidence of respondent, it is clear that the 1946 vacation pay was not compensation for work in 1945, but as in all other years was simply an advantage accruing to an employee on account of his seniority. On this record, no issue is presented on this point. The sole evidence thus far is that the only actual work required at any time was one day at the end of the vacation year, and that the "percentage of earnings" clause was merely a method of computation to reduce 1946 vacation pay proportionately to the amount of time lost during the strike. So the court below considered it, and respondent did not argue otherwise.

Should respondent contend that the singular 1946 provision made vacation pay compensation for work in 1945, or that the provision imposed a requirement of work in 1945, it would face something of a dilemma. Paying twice for or requiring work in a period when most veterans were absent (January — June 1945, as to which the 1945 vacation had already been granted), and paying not at all for a corresponding period when they were present or ignoring the work they performed in the vacation year, (January — June, 1946), would clearly reveal the discriminatory intent as well as effect of the 1946 provision. That the union thought 1946 vacation pay was divorced from any specific amount of work may explain its failure to demand a special provision protecting veterans; for under such view, the veterans should under the contract have been given constructive earnings for 1945 equal to that of the average employee in their wage rates.

in question, regardless of how accurately the bargaining is described; thus they cannot form a basis for summary judgment. (R. 76-79) Petitioners also contended that the "escalator" interpretation of the Act entitled them to vacation pay equal to that received by their fellow employees who remained continuously in their civilian employ, and that summary judgment should be rendered in their favor. (R. 72). The District Court entered summary judgment for respondent without opinion (R. 104) and the Court of Appeals affirmed. (R. 119)

Concerning the first ground, the Court of Appeals held that no discriminatory operation or effect of the provision could exist in the light of Seaton's description of the bargaining through which the 1946 provision was agreed upon. As the Court said, this evidence "completely annihilates plaintiff's contention that such agreement was made in bad faith or that it was discriminatory" (R. 115-116), and allegations of the discriminatory operation and effects of the provision "raise no genuine issue as to a material fact." (R. 118) The decision thus is that the statute does not prevent discriminatory action against veterans, so long as it is done through collective bargaining and the discrimination does not appear overtly in the negotiations or the language of the agreement.

Concerning the second ground, the Court of Appeals held petitioners could not object to the credibility and probative force of the arguments made in the bargaining sessions as proof of the genuine reasons for adoption of the 1946 provision. To justify this conclusion, the court stated that "as to what took place in the bargaining negotiations," "the union as bargaining agent for the employees, including the plaintiffs, presumably had the same information on this score as did the defendant." (R. 117) Furthermore, the court held, petitioners were precluded from this objection by the absence of affidavits from them stating they had no personal knowledge of the facts proving discrimination. (R. 117)

The court rejected the "escalator" interpretation of the Act on authority of decisions of other courts of appeals that the Act is satisfied if veterans are accorded the same treatment given non-veterans on leaves of absence. (R. 111-112). It held that "vacation pay is not a right guaranteed to the returning veteran by the Act." (R. 114).

Reasons for Granting the Writ

This case presents two questions under the reemployment provisions of selective service legislation which are of general and continuing importance. As the draft laws were continued through and beyond the end of the war, down to the present and into the future, the reemployment provisions were retained and their protection scrupulously extended to all of those whose military obligations might impair their positions of employment.[2] International obligations on a world-wide scale will, of necessity, require a large and steady flow of persons from civilian employment into the armed forces and back again. Whether the Act protects absent veterans against discrimination through collective bargaining, and whether on account of their absence they may be penalized in the terms and conditions of their employment because those on ordinary leaves of absence are penalized, are issues of grave and general concern. Those concerned in this action are veterans of the

[2] Service Extension Act of 1941 as amended, Section 7, 55 Stat. 627, 50 U. S. C. App. § 357, preserving and continuing reemployment rights for all those entering service, and extending the rights to members of the Women's Army Corps; Selective Service Act of 1948, Section 9, 62 Stat. 604, 50 U. S. C. App. § 459, continuing reemployment rights for all those entering the armed services after its enactment and relaxing qualification standards for disabled veterans; Universal Military Training and Service Act (1951), Section 1(s), 65 Stat. 86, 50 U. S. C. Supp. IV, App. § 459, raising the limits on periods of military service beyond which reemployment rights are barred, and extending protection to those who leave their jobs but are rejected by the armed forces, and to those who perform only military training duty instead of active service.

second world war who have already returned to civilian life and now find their military service has opened them to permanent disadvantage compared to other employees.[3] But those presently serving in or returning from Korea and elsewhere are equally concerned. And the answer to these questions will seriously affect the morale and decision of those entering or contemplating entry into the military service, now and in the future. From the employer's point of view, the issues here are of almost equal importance. Vacation pay provisions are widely prevalent in collective bargaining agreements and employers' policies, as are pension programs, insurance participation and the like. Employers' costs and competition over the country are directly affected.

The question whether summary judgment may be granted on evidence in an affidavit of which the credibility and probative force are necessarily in issue raises a substantial point of due process, on which decisions of other courts of appeals conflict with the decision below.

1. Petitioners believe that the discrimination lay in the way the 1946 change in the vacation pay provision penalized them more and penalized more of them because of their absence in military service than any other group of employees, and in the way it operated to cast upon petitioners all or nearly all the burden of reduction in vacation pay on account of the strike. Thus in their complaint they alleged that "nearly every veteran returning to General Motors' employ was deprived of vacation pay in 1946 because of his prior absence in military service" and that they were made "the victims of a unique rule discriminating against employees in the mili-

[3] 50,000 out of 250,000 hourly-paid employees of respondent are represented in this action, according to respondent's own estimate in a previous suit (dismissed by stipulation) by one of the veterans to recover this vacation pay. *Horace E. Neal* v. *General Motors Corporation*, Civil No. 6053, E. D. Mich., Southern Div.; petition of intervenor UAW-CIO, par. 7, p. 2; answer of defendant, par. 7, p. 5.

tary service." (R. 3) To sustain their contention, petitioners sought to obtain and introduce evidence showing how respondent's original proposal of fiscal year earnings as a base for vacation pay would have reduced the pay over twice as much for veterans as for other employees and out of all proportion to the time lost in the strike, how the calendar year earnings base exaggerated this discrepancy by depriving nearly every veteran of the small amount of vacation pay left him under the fiscal year base at the same time it restored to other employees most or all of the reduction, and how it was likely respondent knew these effects would occur.[4] (R. 10-14, 31-34)

Respondent showed through Seaton's affidavit (R. 49-52) that the 1946 provision resulted from collective bargaining,

---

[4] A bit of arithmetic will make it clear that petitioners' contentions were more than the "surmise, suspicion and conjecture" which the court below termed them. (R. 116)

The strike lasted 113 days, or .....31% of the year
41 days of it were in 1945, or 36%

Under respondent's "fiscal year earnings" proposal:

Non-veterans (80% of employees; see note 3) lose 31% of normal pay or .....25% of respondent's total cost.

Veterans (20% of employees) lose 70% of normal pay (very few could have returned to work between V-J day and the beginning of the strike, and only 30% of the year remained after the strike) or.....14% of respondent's total cost.

(thus respondent proposed to save itself 39% of its total vacation pay cost, as against 31% of theyear covered by the strike, the additional 8% coming out of the vacation pay of the one-fifth returning from military service.)

Under the "calendar 1945 earnings" proposal:

Non-veterans lose only 36% of what they lost under fiscal year earnings method, or 9% of respondent's total cost; but this loss is offset by the increases from 2% to 3% of earnings for three-year employees (a 50% increase) and 4% to 4½% for the five-year employees (a 12½% increase), so that the figure is considerably less than 9%, say a maximum of .....6% of respondent's total cost.

Veterans lose practically all they had left, or .....6% of respondent's total cost.

and that in the arguments advanced by each side at the bargaining sessions the adverse effects on the veterans did not figure as a reason for adoption of the provision. This evidence, of course, did not refute or even relate to petitioners' contentions. Petitioners contend that the Act prevents the reduction from being made in a manner which casts a disproportionate share of the burden on them, regardless of the arguments in bargaining and the seemingly even-handed language of the provision. If the evidence showing the existence of such a burden is not material, as the court below held in affirming the summary judgment for respondent, then the Act gives the veterans only the protection which the parties to collective bargaining voluntarily accord them. The veterans may be injured in any way and to any extent, so long as it is done via collective bargaining and the injury is not mentioned overtly in the negotiations or in the language of the agreement.

Such a view of the Act seems erroneous. It reduces to inanity the observations of this Court in *Fishgold* v. *Sullivan Drydock Corp.*, 328 U. S. 275, 285, that "no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act," and in *Trailmobile Co.* v. *Whirls*, 331 U. S. 40, 57, that "It is therefore clear that Congress did not confer the rights given as an incident of restoration simply to leave the employer free to nullify them at will, once he made it." And in relying on *Aeronautical Lodge* v. *Campbell*, 337 U. S. 521 to support its conclusion, the court below plainly disregarded the warning therein (p. 529) that the Act prohibits "devices of hostility to veterans." The decisive fact there was not that the veteran's loss of ground stemmed from a provision adopted in collective bargaining, but rather was that the veteran would have been in precisely the same position had he never left his job for military service. Thus on this point the decision below is inconsistent with this Court's interpretation of the Act. The basic problem is whether

the Act has an effective meaning in the large field of employment subject to collective bargaining, an issue of such general importance that this Court should resolve it.

2. Even if evidence concerning the undue harshness of the 1946 provision toward petitioners were material, the court below held, Seaton's affidavit describing the arguments of the union and respondent in negotiating the provision "completely annihilates plaintiff's contention that such agreement was discriminatory as to plaintiffs." (R. 115-116). The summary judgment against them was therefore proper, for the allegation of discrimination "finds no factual support in the record" (R. 116) because petitioners filed no controverting affidavits (R. 117). The court below thus accepted the arguments and reasons urged in the bargaining sessions as the genuine and only reasons for adoption of the provision.

The credibility and probative force of this evidence are necessarily in question, for its acceptance turns on the knowledge, accuracy and sincerity of those doing the bargaining. Collective bargaining negotiations are a process closely akin to horse trading, in which proposals and supporting reasons are advanced to convince the other party rather than to display one's own considerations. The reliability of the arguments is thus inherently suspect. Such evidence does not show that there is "no genuine issue as to material facts," as it must under Rule 56, Federal Rules of Civil Procedure. It is only evidence about material facts.

Petitioners' lack of personal knowledge of the evidence concerning discrimination, their consequent inability to present affidavits controverting Seaton, and the absence of affidavits under Rule 56(f) stating this inability, obvious from their positions as production workers in respondent's plants, do nothing to eliminate the dispute about material facts. The evidence on this issue is largely in the possession of respondent, in its employment and financial records

and in the recollections of its officials.[5] Petitioners had commenced discovery of this evidence and had explained in detail what they expected to prove by it. (R. 26-34) If it is possible this evidence would be material to the existence of discrimination, the summary judgment is inconsistent with views of this Court because it is not yet "quite clear what the truth is." *Sartor* v. *Arkansas Gas Corp.*, 321 U. S. 620, 627 (1947). The affirmance of summary judgment in these circumstances also conflicts squarely with decisions of two other courts of appeals: *Arnstein* v. *Porter*, 154 F. 2d 464 (C. A. 2, 1946); *Colby* v. *Klune*, 178 F. 2d 872 (C. A. 2, 1949); *Farrell* v. *District of Columbia Amateur Athletic Union*, 153 F. 2d 64 (C. A. D. C. 1946); *Garrett Biblical Institute* v. *American University*, 163 F. 2d 265 (C. A. D. C., 1947).

The posture of each of these cases was identical to that of the present one except the credibility here lies one step farther back, in that we are concerned with the accuracy of the statements the affiant says were made in the negotiations rather than whether they were made. In each case, summary judgment was denied. The rule governing them is stated thus in *Colby* v. *Klune*, 178 F. 2d at 873-874:

> The statements in defendants' affidavits certainly do not suffice, because their acceptance as proof depends on credibility; and—absent an unequivocal waiver of a trial on oral testimony—credibility ought not, when witnesses are available, be determined by mere paper affirmations or denials that inherently lack the important element of witness' demeanor. As we observed in Arnstein v. Porter, 2 Cir., 154 F. 2d 464, 471: "It will not do, in such a case, to say that, since the plaintiff, in the matter presented by his affidavits, has of-

[5] The court below asserted this argument was not open to petitioners because "as to what took place during the bargaining negotiations," "the union, as the bargaining agent for the employees, including the plaintiffs, persumably had the same information on this score as did defendant." (R. 117). The court seems to have mistaken petitioners' questioning of the credibility of Seaton's evidence for an attack on his veracity.

> fered nothing which discredits the honesty of the defendant, the latter's deposition must be accepted as true." For the credibility of the persons who here made the affidavits is to be tested when they testify at a trial. Particularly where, as here, the facts are peculiarly in the knowledge of defendants or their witnesses, should the plaintiff have the opportunity to impeach them at a trial; and their demeanor may be the most effective impeachment.

Piantadosi v. *Loew's, Inc.* 137 F. 2d 534 (C. A. 9, 1943), a decision essentially the same as that below and one of respondent's authorities there, was expressly repudiated in favor of the above rule in the *Garrett* case with the comment, "this is so elementary that we decline to follow authority to the contrary in other jurisdictions." 163 F. 2d at 267. The decision below is therefore flatly contrary to these cases. Moreover, that decision represents a serious abuse of summary judgment procedure, amounting to a denial of due process and requiring correction by this Court.

3. The court below held, in mistaken reliance on *Aeronautical Industrial Lodge* v. *Campbell,* 337 U. S. 521 (1949), that the Act did not prevent returning veterans from being penalized in their employment on account of their absence in military service, so long as other employees on non-military leaves of absence are penalized in the same manner.

Such conclusion conflicts with repeated holdings of this Court that the returning veteran is entitled to be restored to the position he would have occupied had he kept his position continuously during the war, so that he does not lose ground by reason of his absence. This interpretation was first announced by this Court in *Fishgold* v. *Sullivan Drydock Corp.,* 328 U. S. 275, 284-286 (1946), in a case involving proper order of layoff. It was reaffirmed each time the Court later considered the Act, in two layoff cases, *Trailmobile Co.* v. *Whirls,* 331 U. S. 40 (1947) and *Aeronautical Industrial Lodge* v. *Campbell,* 337 U. S. 521 (1949),

in a case involving promotion, *Haynes* v. *Cincinnati, N. O. & T. P. Ry.*, 338 U. S. 278 (1949), and in a case involving the right to transfer to a different shop, *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278 (1949). This principle the Court has succinctly analogized to an "escalator" upon which the veteran steps back after military service at the point it has then reached, upward or downward. In its most recent explanation of this principle, the Court has said:

> "An honorably discharged veteran, covered by the statute, was entitled by the Act to be restored not to a position which would be the precise equivalent of that which he had left when he joined the Armed Forces, but rather to a position which, on the moving escalator of terms and conditions affecting that particular employment, would be comparable to the position which he would have held if he had remained continuously in his civilian employment." *Oakley* v. *Louisville & N. R. Co.*, 338 U. S. 278, 283 (1949)

Congress has specifically endorsed this escalator principle as the proper construction of the Act. The statutory provisions here involved were reenacted in 1948 with the addition of an explanatory provision that the veteran should be restored so as "to give him such status in his employment as he would have enjoyed if he had continued in such employment continuously." This was considered merely to express what that statute previously meant.[6]

---

[6] Selective Service Act of 1948, 62 Stat. 604, 50 U. S. C. App. §459(c) (2), renamed the "Universal Military Training and Service Act" in 1951. The provision was added by the Senate Armed Services Committee. "The Committee has taken the position that as a matter of policy, no reemployment rights should be granted to personnel serving under this legislation which would contravene or take precedence over, reemployment rights now enjoyed by men who already have been in the services, and who are now receiving benefits under the 1940 Act. For that reason no important substantive changes have been made in the provisions of the 1940 Act." SEN. REP. No. 1268, 80th Cong., 2d Sess., p. 15 (1948). In commenting specifically upon the new section, the Sen-

Moreover, when Congress thought it appropriate in the case of those not performing extended active military service to limit reemployment rights to the terms and conditions accorded those on ordinary leaves of absence, it so stated in clear and unmistakable terms quite unlike those in the statute before us. For in broadening the protection of the reemployment statute in 1951, Congress provided that a person rejected by the armed forces or one taking training duty "shall be granted a leave of absence by his employer" and nothing more. Universal Military Training and Service Act, Section 9(g)(3), 65 Stat. 86, 50 U. S. C. Supp. IV, App. 459 (g)(3). The decision below is thus at odds with the express views and purposes of Congress, as well as contrary to decisions of this Court.

Among the lower courts there is a widespread conflict between the escalator principle and the leave of absence theory asserted by the court below. The leave of absence theory seems to have appeared first in *Raulins* v. *Memphis Union Station*, 168 F. 2d 466 (C. A. 6, 1948), in which promotions and seniority were the issue. It was reaffirmed quite recently in a seniority case, *Gregory* v. *Louisville & N. R. Co.*, 191 F. 2d 856 (C. A. 6, 1951). On the other hand, the "escalator" principle was followed in another seniority case similar in all material respects. *Morris* v. *Chesapeake & O. Ry.*, 171 F. 2d 579 (C. A. 7, 1948). Where absence in military service caused the veteran to miss opportunities for transfer to a different type or location of work, the leave of absence theory has been applied against him in *Oakley* v. *Louisville & N. R. Co.* 20 Labor Cases (Commerce Clearing House) Par. 66, 132 (E. D. Ky., January 16, 1951), following the remand by this Court, and in identical circumstances the escalator

---

ate Committee added: "Statement of policy regarding application of the 'escalator principle': the provisions of this legislation differ from those contained in the Selective Training and Service Act of 1940, as amended, in that [this] is specifically stated to be the intent of Congress." Id. at 16.

principle has been applied in his favor in *Conner* v. *Pennsylvania R. R.*, 177 F. 2d 854 (C. A. D. C. 1949), cert. den. 339 U. S. 919 (1950). As to vacation pay, the leave of absence theory governed in *Brown* v. *Watt Car & Wheel Co.*, 182 F. 2d 570 (C. A. 6, 1950); cert den. 340 U. S. 875 (1950); the escalator rule controlled in *Mentzel* v. *Diamond*, 167 F. 2d 299 (C. A. 3, 1948), only be abandoned for the leave of absence theory in a suit by a member of the petitioning class here, *Dougherty* v. *General Motors Corp.*, 176 F. 2d 561 (C. A. 3, 1949), cert. den. 338 U. S. 956 (1950). The escalator principle was held to override contractual requirements that the employee forfeit seniority if he resigned, where he resigned to enter military service, *Rudisill* v. *Chesapeake & O. Ry. Co.*, 167 F. 2d 175 (C. A. 4, 1948), and that he be "on the Company's rolls" on December 31 in order to qualify for vacation pay, *MacLaughlin* v. *Union Switch & Signal Co.*, 166 F. 2d 46 (C. A. 3, 1948). In contrast, under the leave of absence theory a contractual provision that time on leave of absence could not be credited toward severance pay was held valid as applied to military service. *Seattle Star* v. *Randolph*, 168 F. 2d 274 (C. A. 9, 1948). In cases in which military service prevented completion of probationary employment and consequent acquisition of seniority, the escalator rule was applied in the earlier and ignored in the later. *Payne* v. *Wright Aeronautical Corp.*, 162 F. 2d 549, 551-552 (C. A. 3, 1947); *Lesher* v. *P. R. Mallory Co.*, 166 F. 2d 983 (C. A. 7, 1948).[7]

[7] The lower courts cite the precedents on promotion, job choice, vacation pay, severance pay, etc. interchangeably so that no distinction can be drawn between these rights. As the court below observed (R. 111): "Other courts have taken the same view, both as to vacation pay and as to other matters embodied in agreements between the union and the employer." See, e.g. *Brown* v. *Watt Car & Wheel Co.*, 182 F. 2d 570 (C. A. 6, 1950) cert. den. 340 U. S. 875 (1950), a vacation pay decision applying the leave of absence rule on authority of a promotion case, *Nevins* v. *Curtiss Wright Corp.*, 172 F. 2d 535 (C. A. 6, 1949); and *Mentzel* v. *Diamond*, 167 F. 2d 299 (C. A. 3, 1948), a vacation pay decision following the escalator rule on authority of a seniority case, *Gauweiler* v. *Elastic Stop-Nut Co.*, 162 F. 2d 448 (C. A. 3, 1947).

Factual differences in these cases do not justify the differences in result. In the *Raulins* and *Gregory* cases, an alternative ground of decision was that the promotion or seniority must accrue automatically by virtue of a contract provision if the Act is to protect it, and that evidence showing the individual veteran would by custom, practice or in fact have received the promotion was immaterial; but in the *Morris* case, a similar or greater uncertainty existed, for only the chance to take an examination was certain, passage was required for promotion and the record shows many failed. In the *Oakley* and *Conner* cases, the circumstances were identical in that the employee was required to elect the transfer before being given the opportunity; Oakley's case was, if anything, slightly stronger than Conner's, for Conner had to show qualification for transfer and Oakley did not. In all these cases, as here, there was a work requirement of one day on the job in order to qualify for the emolument, i.e. seniority there dated from the first day of work. In the *Brown, Mentzel,* and *Randolph* cases, the contract provisions were almost identical, being "continuously in its employ for a period of one (or five) years," "one (or five) years' service," and "total years of full time continuous employment," respectively, and none of the decisions involved an interpretation of the contract. Likewise, the *Payne* and *Lesher* contract provisions were the same and the courts considered their meaning to be the same.[8] Where the leave of absence theory was applied the veterans lost ground every time because of their absence in military service, in the same

[8] The *Dougherty* and *MacLaughlin* cases may have been influenced by the view the courts took of the meaning of the contractual provisions. Cases such as *Siaskewicz* v. *General Electric Co.*, 166 F. 2d 463 (C. A. 2, 1948) and *Dwyer* v. *Crosby Co.*, 167 F. 2d 567 (C. A. 2, 1948) are not pertinent here; they arose under contracts interpreted definitely to require a given amount of actual work to qualify for the benefit, a requirement which, insofar as it was imposed by the 1946 provision, petitioners have met by being at work in the last pay period in June, 1946.

circumstances in which the escalator principle was applied to prevent such loss.

The leave of absence theory and the escalator principle cannot be reconciled. The former permits the veteran to be denied advantages and to be outstripped by his fellows solely because of his absence in military service, not only in one year but in any or all years. The latter assures him that this shall not happen. The former leaves the employer free to determine the veteran's protection by formulating the rules applicable to those on leave of absence.[9] The latter declares that the movement of the escalator cannot be halted or deflected by action of the employer, that the statutory protection cannot be eliminated by collective bargaining agreement.[10]

Resolution of this conflict will determine the reach of the statute itself, governing a field which has received the con-

---

[9] Should this petition be granted, petitioners will urge as they did below that if the leave of absence theory is correct, it too entitles them to 1946 vacation pay. Section 8(c) of the Act requires that petitioners "be entitled to participate in insurance or other benefits offered by the employer pursuant to established rules and practices relating to employees on furlough or leave of absence in effect with the employer at the time such person was inducted." Under this clause, petitioners are entitled to have their 1946 vacation pay computed as if the vacation pay provisions in effect when they were inducted were also in effect in 1946. The provisions for the earlier years would give 40 or 80 hours' pay to employees on ordinary leave of absence for the same portion of the vacation year as petitioners were in military service in the 1946 vacation year.

[10] The escalator principle does not, of course confer any right to pay, vacations or other advantages during the time the veteran is in military service. The question is rather, what rate of benefits, what level of treatment, shall in the future be accorded him after his return.

Further, the principle of itself creates none of the terms or conditions of employment as to which the escalator operates. These must be established independently of the Act, by employer policy, practice or, as here, by collective bargaining agreement. But once they are so established for other employees, the escalator prevents their loss or impairment on account of absence in military service.

Likewise, the principle does not exempt petitioners from reduction of their vacation pay on acount of the strike, to the same extent as reduction was made for other employees.

tinued attention of Congress. Since the statute provides no administrative determination which might tend to still the discord, judicial action becomes essential.[11] The issue is wider than vacation pay; but even as to that problem, the outcome will have a direct and large significance to a great proportion of employers throughout the country and to all of their employees who may be liable for military service.[12] According to two recent surveys made for the information and guidance of employers, vacation pay for those performing military service has been expressly embodied in 85%, and 205 out of 212, respectively of the col-

[11] The widespread effect of this statute appears in the litigation of over 400 cases in the courts since the first suit occurred in 1944. Annual Report of Secretary of Labor, 1950, p. 77. The continuing impact of the Act's protection, or lack of it, is shown in repeated efforts to obtain decision from this Court on issues which veterans, employers, or both consider of general importance. Since the *Oakley* decision, ten petitions for certiorari have been filed in seven cases. The Secretary of Labor, responsible under Section 8(g) of the Act, and P. L. 26, 80th Cong., 61 Stat. 21, for aiding veterans to obtain reemployment rights, observed in his report (p. 78):

> Many other issues, however, equally as important [as this Court's *Oakley* decision], are still undetermined and await further litigation. Among these are the veteran's rights to promotions, to vacation pay, and to protection of his pension rights.
>
> Since the end of hositilities in Europe there has been a tremendous rise in private pension plans. Since that time, too, the labor force within an industry generally has acquired greater seniority than that possessed at the outbreak of World War II. Both factors tend to increase the importance of the right to return to the position left for military service, and in the future an even greater percentage of veterans can be expected to claim the benefits of the statutes than in the past. Indeed, with the outbreak of hostilities in Korea, there was an immediate manifestation of interest by persons likely to be called into military service concerning their right to return to their civilian employment. Even before entrances into military service increased substantially, the volume of work in [this field] rose 10 percent.

[12] 800,000 will be released and replaced annually (in peacetime; casualties excluded) at the stable military strength of 3½ million recommended by the Department of Defense, said Secretary Marshall. Hearings on H. R. 1752, House Committee on Armed

lective bargaining agreements or employer policies examined. Bureau of National Affairs Special Survey, *"Military Leave Policies of 500 Corporations,"* (October 1950) p. 7-8, 13, 16; National Industrial Conference Board, Studies in Personnel Policy, No. 114, *"Company Military Leave Policies"* (1951) pp. 23-25.[13] As would be expected, these provisions reflect very specifically the existing conflict among lower courts over the escalator principle as against the leave of absence theory.

If the escalator principle is still the meaning of the Act, this Court should so declare and insist upon its observance by lower courts. If the principle is to be discarded, the veterans should be told so, that they may seek through legislation to make effective the mandate of Congress that they be restored "to such status as they would have enjoyed if they had continued in such employment continuously."

Conclusion

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

WEAVER & GLASSIE
THOMAS M. COOLEY, II

Services, 82d Cong., 2d Sess., p. 17 (1951). In his State of the Union message on January 9, 1952, the President said the Armed Forces now total "nearly three and one-half million." 98 Cong. Rec., January 9, 1952, at p. 30.

[13] An immediate and closely-related example of the way this issue may affect future years is respondent's own pension agreement dated May 29, 1950, with the same union, and covering the same employees as the vacation pay provision. Article III, section 1(b), p. 25, provides "that if there was an interval equal to two years or more between periods of employment * * * no service prior to such interval shall be counted" toward the length of employment needed to qualify for a pension. The extent to which two years of military service might cause employees to lose pension credits for prior employment is identical to the question in the present case.

FEB 14 1952
CHARLES ELMORE CRO
CL

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 533

WALTER H. FOSTER, ET AL.,
Petitioners,

vs.

GENERAL MOTORS CORPORATION,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

HUBERT HICKAM,
THOMAS M. SCANLON,
JERRY P. BELKNAP,
Attorneys for Respondent.

BARNES, HICKAM, PANTZER & BOYD,
1313 Merchants Bank Building,
Indianapolis 4, Indiana,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

INDEX.

PAGE

Definitions and Abbreviations Used Herein..... 1

Statement of the Case..... 2

Summary of Argument..... 7

Argument 9

1. This Court Has Already Declined to Review the Decision of Another Court of Appeals Reaching the Same Result on the Same Issues, and No New Reason Is Advanced Here for Granting the Writ in This Case..... 9
2. The Vacation Pay Provisions of the 1946 Agreement Do Not Constitute a Wrongful Discrimination Against Returned Veterans..... 10
3. Summary Judgment Was Properly Entered.. 12
4. Petitioners Are Not Entitled to Recover Under the Escalator Principle..... 14

Conclusion 17

Table of Cases Cited.

Aeronautical Industrial Dist. Lodge v. Campbell (1949), 337 U. S. 521, 525-6, 530..... 16

Altgens v. The Associated Press (C. A. 5, 1951), 188 F. 2d 727 16

Arnstein v. Porter (C. A. 2, 1946), 154 F. 2d 464..... 13

Brown v. Watt Car & Wheel Co. (C. A. 6, 1950), 182 F. 2d 570, 572, cert. den. 340 U. S. 875..... 11

Colby v. Klune (C. A. 2, 1949), 178 F. 2d 872..... 13

Cushnier v. Ford Motor Co. (E. D. Mich. 1950), 89 F. Supp. 491, 495..... 16

Dougherty v. General Motors Corp. (C. A. 3, 1949), 176 F. 2d 561 ..... 9, 11, 12, 15

Edward & Deutsch Lith'g Co. v. Boorman (C. A. 7, 1926), 15 F. 2d 35, 37, cert. den. 273 U. S. 738 13

Engl v. Aetna Life Ins. Co. (C. A. 2, 1943), 139 F. 2d 469, 472-3 14

Farrall v. District of Columbia Amateur Ath. Union (C. A. D. C. 1946), 153 F. 2d 647 14

Garrett Biblical Inst. v. American University (C. A. D. C. 1947), 163 F. 2d 265 14

Gauweiler v. Elastic Stop Nut Corp. (C. A. 3, 1947), 162 F. 2d 448, 451 ..... 11, 16

Monticue v. Baltimore & O. R. Co. (N. D. Ohio 1950), 91 F. Supp. 561 11

Nevins v. Curtiss-Wright Corp. (C. A. 6, 1949), 172 F. 2d 535 16

Radio City Music Hall v. U. S. (C. A. 2, 1943), 135 F. 2d 715, 718 14

Siaskiewicz v. General Electric Co. (C. A. 2, 1948), 166 F. 2d 463, 465-6 15

Woods v. Glen Alden Coal Co. (M. D. Pa. 1947), 73 F. Supp. 871 11

Zagaiski v. Carboloy Co. (E. D. Mich. 1950), 88 F. Supp. 162, 166 16

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 533.

WALTER H. FOSTER, ET AL.,

Petitioners,

vs.

GENERAL MOTORS CORPORATION,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

DEFINITIONS AND ABBREVIATIONS USED HEREIN.

In the interests of convenience and brevity, the following expressions used in this brief shall be taken to mean:

Act—The Selective Training and Service Act of 1940, as amended, 50 U. S. C. A. Appendix, Sec. 308.

Union—International Union, United Automobile, Aircraft and Agricultural Implement Workers of America, affiliated with the Congress of Industrial Organizations, the duly certified collective bargaining agent for petitioners.

1946 Agreement—Collective bargaining agreement between the Corporation and the Union dated March 19, 1946.

Strike—The strike called by the Union against the Corporation on November 21, 1945, and which continued until March 13, 1946.

STATEMENT OF THE CASE.

Petitioners' statement at pages 3-8 of their petition consists principally of argument and comment. Briefly stated, the facts of the case are as follows:

Petitioners' complaint (R. 1-4) asserted a class action, on behalf of all of respondent's veteran employees, to recover vacation pay for the years 1946. It was conceded that petitioners were not entitled to such vacation allowance by the terms of the 1946 Agreement, but it was claimed that the 1946 Agreement violated the Act because respondent's returned-veteran employees had little or no 1945 earnings on which to base vacation pay under the 1946 Agreement.

Respondent thereafter filed its motion for summary judgment, together with two supporting affidavits. Petitioners never attempted to file any counter affidavits or affidavits under Rule 56(f) explaining their inability to file counter affidavits.

Respondent's affidavits show the following facts:

Petitioners are all veterans and hourly-rated employees of the respondent. Each of them left his position of employment with respondent to enter military service, applied seasonably for reinstatement to his job and has otherwise met the requirements for reinstatement of Section 8 of the Act. Each was reinstated in his employment in accordance with the Act. (R. 37.)

Petitioners were and are members of the Union and at all pertinent times were members of a bargaining unit for which the Union had been duly certified bargaining agent by order of the National Labor Relations Board. (R. 37.)

The named petitioners received all vacation allowance, if any, due them by respondent prior to the date of their respective military leaves. (R. 39.)

Vacation allowance for hourly-rated employees was the subject of annual negotiations and agreement between the respondent and the Union every year from 1940 to 1946. The various vacation allowance agreements were sometimes agreed upon and sometimes dictated by the government. (R. 41.)

The vacation provision of each agreement from 1940 to 1947, inclusive, can be found in the Seaton affidavit. (R. 43 to 54 inclusive.) Generally, to qualify for a vacation allowance prior to 1946, the employee must have been working for respondent at least one year, *i. e.*, have one year's seniority; and he must have still been working for respondent at the end of the vacation year, July 1st to June 30th, or laid off subsequent to May 1st. If not so working at the end of the year or not so laid off, he could qualify only if he had worked 75% of the work weeks during the vacation year.

In the fall of 1945, in accordance with annual practice, respondent and the Union commenced negotiation on a new collective bargaining agreement including provisions for vacation allowance for 1946. While these negotiations were in progress the Union called a strike which commenced on November 21, 1945, and lasted until March 13, 1946. Said negotiations continued throughout the strike period. (R. 49.)

Respondent proposed to the Union that in lieu of vacation with pay for the year 1946 each employee with one year of seniority on July 1, 1946, would receive a vacation allowance of 40 hours pay and each employee with five or more years of seniority on July 1, 1946, would receive a vacation allowance of 80 hours' pay, provided each such

employee worked 75% of the pay periods during the period mutually agreed upon as the vacation year. The respondent further proposed that an employee who did not qualify under this proposal could nevertheless receive 2% or 4% of his total earnings during the period July, 1945, to July, 1946, depending upon his seniority, as his vacation allowance. (R. 49, 50.)

The Union rejected these proposals stating their reason to be that few employees would qualify for such a vacation allowance in view of the extensive layoff periods necessitated by the conversion from wartime to peacetime operations and because of the length of the strike. (R. 50.)

Respondent then suggested a vacation allowance equal to 2% of total earnings for employees with one or two years seniority, 3% for employees with three to five years seniority, and 4½% for employees with seniority of more than five years with the period from July, 1945, to July, 1946, as the earning period against which such percentages would apply. (R. 50.)

The Union countered with the proposal that the calendar year 1945 be used as the earning period, arguing that by using this base those employees who had been on strike since November 21, 1945, would not receive the full impact of the time lost in one vacation year. (R. 50, 51.)

At that time respondent pointed out to the Union that certain employees who had not worked during the calendar year 1945, would receive substantially less by using 1945 as the base period as suggested by the Union than by using the period suggested by the defendant. (R. 51.)

The Union was adamant in its position and asserted that the strike could not be settled unless the Union's counter-proposal as to vacation allowance was accepted. Finally, on March 13, 1946, respondent capitulated and the 1946

agreement was executed with the following provision for vacation allowance:

> "Any employee with one or more years' seniority as of July 1, 1946, who works during the pay period beginning June 24, 1946, and ending June 30, 1946, in any General Motors plant or who has been laid off after May 1, 1946, shall be eligible for vacation allowance on the following basis:
>
> '(a) An employe with one year but less than three years' seniority as of July 1, 1946, shall be compensated on the basis of 2% of his gross earnings for the period from January 1, 1945 to December 31, 1945.'
>
> [Paragraphs (b) and (c) are similar to (a) but provide graduated percentages according to years of seniority.]
>
> "Each factory employe having one or more years' seniority who is ineligible for vacation pay under the first paragraph above, shall be entitled to a vacation allowance as provided in Paragraphs a, b and c, above, based upon his seniority as of July 1, 1946, provided he has worked during 26 pay periods between the dates of July 2, 1945 and June 30, 1946 in General Motors plants. The vacation allowance of such employes shall be based upon their gross earnings in all General Motors plants during the calendar year 1945." (R. 52-53.)

None of the named petitioners was in the active employ of respondent during 1945 and none received any wages from respondent during that year. (R. 37, 39.)

The 1946 Agreement, like prior agreements between the Union and respondent, contemplated leaves of absence without loss of seniority for reasons other than military service. Such reasons included illness and Union business. (Secs. 106, 109.) The 1946 Agreement also protected an employee with five or more years of service from loss of his accumulated seniority although laid off for a period up to five years. (Sec. 64(e).) Paragraphs 104 and 105 of that agree-

ment provided for formal leaves of absence without loss of seniority and Paragraphs 106 and 108 provided for sick leaves upon the same terms. Paragraphs 109 and 110 provided for leaves of absence up to one year when taken in connection with Union business. In the event that any non-veteran employee, although retaining his seniority, did not work and received no pay during the calendar year 1945, he was entitled to no vacation allowance by the 1946 Agreement, although he may have worked steadily during the calendar year 1946 after the period of the strike. (R. 54.)

On this record, the District Court entered summary judgment for respondent and the Court of Appeals affirmed that judgment for the reasons set forth in its opinion. (R. 108-118.)

SUMMARY OF ARGUMENT.

I. The same questions presented here as to the rights of respondent's re-employed veterans to vacation pay for 1946 under the Act, in view of the provisions of the 1946 Agreement, have been determined the same way by the Court of Appeals for the Third Circuit in a decision this Court refused to review. No new reasons are advanced here for granting a writ of certiorari in this case.

II. The discrimination question presented is whether the 1946 Agreement discriminated against veterans because under it they received little or no vacation pay. The 1946 Agreement treats returned veterans the same as non-veteran employees on furlough or leave of absence during 1945 and does not discriminate against veterans. Comparison of the number of veterans affected with the number of non-veterans affected under the 1946 Agreement has no bearing on the question of discrimination. The record shows that the adoption of 1945 as the base period for determining vacation pay was done at the Union's insistence to protect the employees from the full impact of time lost during the Strike, and such facts do not render the 1946 Agreement discriminatory or illegal.

III. Petitioners neither filed any counter affidavits showing any dispute as to the facts stated in respondent's affidavits, nor filed any affidavit explaining their inability to do so. The facts as to the negotiations of the 1946 Agreement were fully available to them since their own collective bargaining agent, the Union, was a party to those negotiations. The courts below were, therefore, justified in accepting the facts set forth in respondent's affidavits as undisputed for purposes of entering summary judgment.

IV. Vacation pay is not an element of "seniority, status, and pay" and the right thereto stems from the Union contract. Veterans are not entitled to recover vacation pay under the escalator principle as though they had worked continuously while in military service but are only entitled to the same treatment accorded non-veteran employees on furlough or leave of absence. Veterans are bound by changes in the Union contracts so long as such changes do not discriminate against them because of their absence in military service.

ARGUMENT.

1. This Court Has Already Declined to Review the Decision of Another Court of Appeals Reaching the Same Result on the Same Issues, and No New Reason Is Advanced Here for Granting the Writ in This Case.

The identical question of the rights of respondent's returned-veteran employees to vacation pay for the year 1946 under the Act has already been adjudicated in another Circuit in the case, *Dougherty* v. *General Motors Corp.* (C. A. 3, 1949), 176 F. 2d 561. There, as here, it was held that the provisions of the 1946 Agreement did not impair the rights of respondent's returned-veteran employees under the Act. The same questions now urged were presented to this Court by a petition for a writ of certiorari in the *Dougherty* case, but this Court denied such petition (1950), 338 U. S. 956.

Substantially all of the material facts in the *Dougherty* case were stipulated, and the stipulation (Dougherty R. 10-20) sets forth precisely the same facts shown by respondent's affidavits presented here (R. 36-54) except that the affidavits here also show the history of the negotiations of the 1946 Agreement and the details of the 1947 agreement relating to vacation pay, the facts as to which the Court of Appeals in the *Dougherty* case indicated would materially reinforce their decision (176 F. 2d at 563).

While the Dougherty decision is not technically *res judicata* as to petitioners, except as to Dougherty himself as a member of the class, it is clearly a precedent entitled to great weight, and was so regarded by the Court of Appeals below. (R. 110-111.)

It is likewise of some significance for present purposes

that the two Courts of Appeals which have considered the identical questions presented here have reached the same conclusion. While this Court's denial of certiorari in the *Dougherty* case has no independent legal significance here, it is only fair to note that the present petition advances no new reasons for granting the writ which have not been already considered by this Court and found wanting.

2. The Vacation Pay Provisions of the 1946 Agreement Do Not Constitute a Wrongful Discrimination Against Returned Veterans.

Petitioners' discrimination theory advanced here is difficult to understand, but seems to be predicated on the idea that discrimination results because more of the re-employed veterans were adversely affected than any other group of employees. It is worthy of note that petitioners make no charge here that the 1946 Agreement was adopted in bad faith as a device of hostility toward re-employed veterans. Such a theory was suggested in the briefs below, but the Court of Appeals completely answered any charge of that character (R. 115-118), and petitioners have made no attempt to resurrect such a claim in their statement of the questions presented. (Petition, p. 2.)

It is, of course, clear that all veterans absent in the service and all non-veteran employees on leave of absence during 1945 were treated alike. The 1946 Agreement provides for equal treatment, and no claim is made in the complaint or elsewhere that respondent has ever, let alone in 1946, paid vacation pay to non-veterans contrary to the applicable contract provisions.

Under the circumstances, if petitioners are given vacation pay rights for the year 1946, it will necessarily discriminate in their favor as veterans and against the non-veteran employees who received such vacation pay only on

the basis of their 1945 earnings. The courts have uniformly held that the Act requires no such discriminatory treatment in favor of veterans.

The cases involving re-employed veterans' rights to vacation pay are uniform in their treatment of the problem. The consistent holding is that the re-employed veteran is entitled to be treated like non-veteran employees on furlough or leave of absence, but no better, since the Act does not authorize any discrimination against non-veteran employees in favor of the re-employed veterans. The list of vacation pay decisions applying this rule is long. In addition to the cases cited by the Court of Appeals here (R. 110-113), the following may be added: *Brown* v. *Watt Car & Wheel Co.* (C. A. 6, 1950), 182 F. 2d 570, 572, cert. den. 340 U. S. 875; *Woods* v. *Glen Alden Coal Co.* (M. D. Pa. 1947), 73 F. Supp. 871; *Cushnier* v. *Ford Motor Co.* (E. D. Mich. 1950), 89 F. Supp. 491, 494-7; *Monticue* v. *Baltimore & O. R. Co.* (N. D. Ohio 1950), 91 F. Supp. 561.

These cases all deny the applicability of any test of discrimination based on the comparative numbers of veterans and non-veterans affected. As the court noted in the parallel case, *Dougherty* v. *General Motors Corp.* (C. A. 3, 1949), 176 F. 2d 561:

> "* * * We are not unaware that, since few veterans were restored to their positions with General Motors until the closing months of 1945 at the earliest, the interpretation of the contract with General Motors espouses and the district court adopted means that veterans restored to duty with that company receive little, if any, vacation pay for the year 1946. * * *
>
> "It is clear, therefore, that the 1946 vacation pay provisions cannot be declared illegal as to Dougherty simply because their effect is to deny him—and any other General Motors employee, veteran or non-veteran, who had no 1945 gross earnings—1946 vacation pay." (176 F. 2d 562-563.)

The rule is that it is not unlawful to deny the veteran vacation pay unless the employer has an established rule to give such pay to employees on leave of absence. No claim is or can be asserted here that respondent had any such established rule.

Unless the courts in all of the prior decisions have been consistently misconstruing the Act, the decision here attacked is the only one the court below could have reached.

3. Summary Judgment Was Properly Entered.

As has been heretofore noted, the affidavits submitted in support of respondent's motion for summary judgment set forth all of the facts presented in the parallel case, *Dougherty* v. *General Motors Corp.* (C. A. 3, 1949), 176 F. 2d 561, and in addition showed the history of the negotiations of the 1946 Agreement, which the Court of Appeals for the Third Circuit had indicated would materially reinforce their decision. (176 F. 2d at 563.)

Petitioners made no attempt to file counter affidavits, although they undoubtedly had access to the facts as to the 1946 negotiations. Those negotiations were carried on with the Union, as petitioners' representative for collective bargaining, and there is no reason to believe petitioners' own Union would deny them a full disclosure of the facts, as the Court of Appeals here noted. (R. 117.) Again, as the Court of Appeals noted, petitioners always had access to the provisions of Rule 56(f) in the event they wished to controvert in good faith the facts set forth in respondent's affidavits but were unable to do so by affidavits of anyone having first-hand knowledge of the facts. (R. 117.) Yet petitioners made no attempt to make any showing of any factual disagreement with respondent's affidavits. Certainly if the accuracy of what was said in the 1946 negotiations was to be contested by petitioners, they had ample

avenues open to them to show that there was some real dispute about the facts.

The reasoning of the Court of Appeals on the summary judgment question raised here (R. 116-117) is a complete answer to objection here urged. Indeed, unless Rule 56(f) is to be read out of the Federal Rules of Civil Procedure, it seems to be the only proper answer.

The cases cited by petitioners as presenting some different rule hardly bear out what is claimed for them. The two Second Circuit cases cited for the proposition that where credibility is involved, an issue of fact necessarily exists, do contain some broad statements that would probably require an automatic refusal of any summary judgment on affidavits if taken to their logical conclusion. The facts show that a narrower reading is necessary. Thus, in *Arnstein* v. *Porter* (C. A. 2, 1946), 154 F. 2d 464, the issues were whether defendant knew of plaintiff's compositions and had copied them. Defendant denied knowledge and copying under oath. However, plaintiff did show other facts indicating a definite possibility of knowledge. The court held defendant's denial could not be held to foreclose any issue of fact. The decision is thus not unwarranted on the facts, for even *unconscious* plagiarism would suffice to make a cause of action, *Edward & Deutsch Lith'g Co.* v. *Boorman* (C. A. 7, 1926), 15 F. 2d 35, 37, cert. den. 273 U. S. 738, and obviously defendant himself could not and did not produce any evidence on that point.

In *Colby* v. *Klune* (C. A. 2, 1949), 178 F. 2d 872, the main issue was the extent of the authority and duties of a corporate employee to determine whether he was an "officer" under an S. E. C. regulation. As shown by the opinion of the trial court, 83 F. Supp. 159, affidavits and counter affidavits were filed. The issue obviously was one not to be proved on the evidence of any one witness and the court held a summary judgment improper.

The broad statements made in these decisions clearly are not followed rigidly by the Second Circuit itself. *Radio City Music Hall* v. *U. S.* (C. A. 2, 1943), 135 F. 2d 715, 718; *Engl* v. *Aetna Life Ins. Co.* (C. A. 2, 1943), 139 F. 2d 469, 472-3.

Farrall v. *District of Columbia Amateur Ath. Union* (C. A. D. C. 1946), 153 F. 2d 647, presents the case where the affidavits supporting the motion for summary judgment did not cover three of the charges made in the complaint. (153 F. 2d at 650.)

In *Garrett Biblical Inst.* v. *American University* (C. A. D. C. 1947), 163 F. 2d 265, the issue was whether gifts of money to plaintiff were made without restriction as to their use. Plaintiff's affidavit contained the conclusion that there was no restriction, but gave no supporting facts other than a reference that "a careful search of the documents relating to the terms of the award * * * together with the attendant circumstances of the gift" made clear to it such a conclusion. (163 F. 2d at 267.) Such an affidavit clearly does not comply with Rule 56(e) and could hardly be urged as *proof* of the ultimate fact.

4. Petitioners Are Not Entitled to Recover Under the Escalator Principle.

While petitioners go to some length to discuss the escalator principle as a theory of recovery, it is difficult to find the point under their statement of the questions presented. (Petition, p. 2.) In any event, the authorities are uniformly contrary to their position.

The vacation pay cases uniformly deny the application of the escalator principle as a means of giving re-employed veterans a discriminatory edge over non-veterans. The present case and its parallel case, *Dougherty* v. *General*

Motors Corp. (C. A. 3, 1949), 176 F. 2d 561, 563-4, cert. den. (1950), 338 U. S. 956, are plain on the point. These decisions are not unique. In *Siaskiewicz* v. *General Electric Co.* (C. A. 2, 1948), 166 F. 2d 463, 465-6, the court held that vacation pay had no relation to the "seniority, status and pay" of § 8(c), and said in part:

> "Appellants argue that, in refusing to give them vacation pay, the company failed to restore them to their former position, or a position of like seniority, status and pay, and failed to restore them without loss of seniority, thus violating section 8(b) (B) and (c) of the Selective Training and Service Act. The company concedes that, if appellants are entitled to vacation pay, the amount of that pay will be determined by appellants' seniority. *But right to vacation pay stems from the union contract, and that contract does not provide for vacation pay based on seniority alone.* Seniority consists of a relative position among all employees within a specified job group, determined by length of service with the employer, and controlling, to the extent provided for in the contract, such matters as layoffs and promotions and such other benefits as vacations.
>
> "* * * Since vacation rights are not pay unless they are for work actually done, and since they are not merely a perquisite of seniority, they must fall under the heading of 'other benefits.' Hence, under the language of the Act, appellants must be treated like non-veteran employees on furlough or leave of absence." (166 F. 2d 465-6.)

Practically all of the vacation pay cases adopt the same test as to the veterans' rights—unless it can be shown that the employer has an established practice of granting vacation pay to employees on leave of absence, the returning veteran has no right thereto.

The theory underlying these cases is that vacation pay rights stem from and must be governed by the union con-

tract creating such rights. They clearly are not an element of seniority and pay even though vacation pay is calculated to grant relief from and compensation for work already performed, as the courts have noted both in the *Dougherty* case and the *Siaskiewicz* case. In the present case, vacation pay agreements were separately negotiated between the respondent and the Union each year, and were changed from year to year. So long as the agreements so made do not discriminate against veterans, they are binding on veteran and non-veteran employees alike. *Aeronautical Industrial Dist. Lodge* v. *Campbell* (1949), 337 U. S. 521, 525-6, 530; *Gauweiler* v. *Elastic Stop Nut Corp.* (C. A. 3, 1947), 162 F. 2d 448, 451; *Cushnier* v. *Ford Motor Co.* (E. D. Mich. 1950), 89 F. Supp. 491, 495. This, of course, is the analysis of the *Dougherty* decision and is well supported.

Changes in the underlying employer-employee contract are, indeed, the rule, not the exception. As this Court noted in *Aeronautical Industrial District Lodge* v. *Campbell* (1949), 337 U. S. 521, 525:

> "It is of the essence of collective bargaining that it is a continuous process. Neither the conditions to which it addresses itself nor the benefits to be secured by it remain static. They are not frozen even by war."

The courts in other fields have held that the escalator principle does not apply to all cases indiscriminately to require that veterans be given rights as though every day in service had been a day worked. The test is whether veterans are treated less favorably than non-veteran employees on leave of absence. *Zagaiski* v. *Carboloy Co.* (E. D. Mich. 1950), 88 F. Supp. 162, 166; and pay increases in the nature of merit increases, *Nevins* v. *Curtiss-Wright Corp.* (C. A. 6, 1949), 172 F. 2d 535; *Altgens* v. *The Associated Press* (C. A. 5, 1951), 188 F. 2d 727. These cases all reject any recovery on the theory the petitioners argue.

This position is certainly not a negation of the escalator principle as petitioners intimate. That principle has been often applied, but it is not applied as a means of giving re-employed veterans preferential treatment over that accorded non-veteran employees. There is nothing in the principle that renders the decision in question here subject to attack.

Conclusion.

Petitioners are here attacking the vacation pay provisions of a collective bargaining agreement which were adopted after long negotiations between their own collective bargaining agent, the Union, and respondent. Under the terms of that agreement they are not entitled to vacation pay any more than any non-veteran employee of respondent who had no 1945 gross earnings. Unless petitioners are entitled to preferred treatment by giving them rights denied respondent's non-veteran employees on furlough or leave of absence in 1945, the Court below could reach no other decision.

The petition is without merit and should be denied.

Respectfully submitted,

HUBERT HICKAM,
THOMAS M. SCANLON,
JERRY P. BELKNAP,
Attorneys for Respondent.

BARNES, HICKAM, PANTZER & BOYD,
1313 Merchants Bank Building,
Indianapolis 4, Indiana,
Of Counsel.

FEB 1 3 195
CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 533.

WALTER H. FOSTER, ET AL., *Petitioners,*

v.

GENERAL MOTORS CORPORATION.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITIONERS' REPLY BRIEF.

Respondent asserts that no new reasons are advanced here for granting the writ which were not rejected by denial of the writ in *Dougherty* v. *General Motors Corp.*, 338 U. S. 956. (Br. 9, 10) But that case posed only one of the issues here, the escalator principle versus the leave of absence theory.

On this issue decisions since the *Dougherty* case, of which the petition cites *Gregory, Brown* and *Oakley* (after re-

mand) (Pet. 16-18), have sharpened the conflict among the lower courts, and have raised the leave of absence theory to a position of prominence if not dominance. The changed military posture of the country, caused by hostilities in Korea and threats of aggression elsewhere, has vastly increased the importance of the correct interpretation of this statute, both now and for the future. This increased importance has found effect in the establishment by employers generally of policies covering such matters as vacation pay for those absent in military service (Pet. 20-21), and in Congressional action in 1951 amending the Act (Pet. 8, n. 2; 16).

The discrimination question and its corollary, the summary judgment issue, were not presented by Dougherty, as his petition shows. Though Dougherty argued in the court of appeals that the 1946 agreement was discriminatory, it is clear from both the opinion and his brief that he contended the "discrimination" lay in barring him from the escalator. While the escalator principle may properly be rephrased in terms of preventing discrimination, the discrimination of which petitioners complain is more pointedly direct and vicious: it results from giving to the non-veteran in the form of additional vacation pay or to the employer in the form of savings what was taken from the veterans, rather than simply preventing veterans from keeping pace with their fellows. Respondent defends this result by asserting that the veteran absent three years is no worse off than the non-veteran absent two weeks for vacation or illness because both had no earnings during the absence, and that to reach a different result would "discriminate in favor of veterans." (Br. 10-11). The veteran because of military service loses 52/52 of his vacation, and the non-veteran loses only 2/52. Any "equality" between them is unrealistic and merely formal. Whether such formal equality satisfies the Act when the practical application, the concrete effects, the distribution of losses, guarantee the veteran (and scarcely anyone else) a far

worse position in fact and substance is the question here. No such question arose in the *Dougherty* case.

Respondent is mistaken in assuming (Br. 10) petitioners have abandoned their contention below that the 1946 provision was a device of hostility toward veterans. As they say in their petition (p. 10), they believe respondent knew the effects of the 1946 provision, both when it proposed the novel "percentage of earnings" computation and when it assented to calendar year earnings as a base, and that this knowledge, express or implied, amounts to a purpose that veterans should be injured as they were. Though Dougherty did not mention these circumstances, the possibility of their existence disturbed the court of appeals sufficiently for it to mention them (176 F. 2d at 563) and to limit its decision cautiously to the case where "the intent and operation do not place veterans in a position inferior to that of non-veterans on leave of absence." 176 F. 2d at 564. Respondent's admission below that it knew it was "particularly veterans" (R. 58) who were adversely affected by the peculiar 1946 method of figuring vacation pay amply shows intent, if intent is essential to discrimination. The court below attached no importance to the crucial fact that the "percentage of earnings" clause was peculiar to 1946, the only year it could have wrought so much damage to so many returning veterans (see Petition, 5, 10); indeed, the opinion erroneously stated that it was used in all other years. (R. 110) Together, these circumstances make it clear the decision below is that discrimination is permitted if done through collective bargaining; on no other ground can it be sustained. Disposition of the case by summary judgment confirms this rationale. The problem in no way appeared in the *Dougherty* case. Its importance is obvious. Since this case presents it clearly, this Court should resolve it.

Respectfully submitted,

WEAVER & GLASSIE
THOMAS M. COOLEY, II

FILED
APR 2 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 533.

WALTER H. FOSTER, ET AL., *Petitioners*

v.

GENERAL MOTORS CORPORATION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITION FOR REHEARING ON ORDER DENYING THE WRIT.

WEAVER & GLASSIE
THOMAS M. COOLEY II.
for Petitioners.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 533.

WALTER H. FOSTER, ET AL., *Petitioners*

v.

GENERAL MOTORS CORPORATION

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

PETITION FOR REHEARING ON ORDER DENYING THE WRIT.

Petitioners respectfully request a rehearing of their petition for certiorari, for the reason that a very recent decision of another Court of Appeals, rendered since the submission of all briefs herein, is in conflict with the decision below on the question of discrimination. This case is *Huffman* v. *Ford Motor Co.*, decided by the Court of Appeals for the Sixth Circuit on March 3, 1952. It has not yet been

reported officially but is reported at 21 Labor Cases ¶ 66,799 (advance sheets). Copies of the decision have been filed with the clerk for the convenience of the Court.

Huffman, for himself and some 275 other veterans, brought an action under the statute here involved, contesting a provision of a collective bargaining agreement. This provision gave to employees initially hired by Ford on their release from military service seniority credit for the time they spent in the armed forces. As a result, some of these newly-hired veterans acquired greater seniority than Huffman and other veterans who had worked for Ford before their military service. Huffman contended that the layoff of himself and his fellows prior to the newly-hired veterans, in accordance with the seniority so established, was discriminatory and illegal. The court held that the layoff was not a "discharge without cause" violating the reemployment statutes, because under this Court's *Fishgold* decision a layoff is not a discharge.

The court then considered the existence of discrimination, and held:

"We see nothing in this ruling [the *Campbell* case] which validates contracts made without regard for the protection of the interests of all members of the union. We think that action which results in widespread discrimination is not justified by the lack of definite malice or hostility. Well-meaning desires, not dishonest in the sense of expressing deliberate hostility, may at times, due to failure to consider all pertinent factors, result in discriminatory measures. The end result for Huffman and those similarly situated is the same as if there had been deliberate hostility. No evidence was presented on the question but we assume that both the union and Ford, in executing this bargaining contract, had a well-meaning desire to protect veterans who had had no chance for employment prior to their service in the armed forces. But in so doing they clearly discriminated against other veterans who had entered the military service when already employed by

Ford. We think such a contract is not authorized under the National Labor Relations Act.

"Section 157, 29 U. S. C., provides that employees have the right to bargain collectively and 'to engage in concerted activities, for the purpose of collective bargaining or other mutual aid or protection.' This means that in entering into labor contracts the bargainers must make their agreements with a view to the rights of the entire group bound by them, and not enter into agreements which discriminate against one part for the benefit of another. *Gauweiler* v. *Elastic Stop Nut Corp.*, 162 Fed. (2d) 448, 451 (C. A. 3). As pointed out in that case, which was approved by the Supreme Court in *Aeronautical Lodge* v. *Campbell*, supra, no discrimination existed against veteran employees. 'Discrimination,' the court declared, 'would obviously change the whole picture.'

"Under the National Railway Labor Relations Act just as under the Railway Labor Act the bargaining representative of the employees rests under the obligation to exercise fairly the power conferred upon it in behalf of all those for whom it acts without discrimination. Cf. *Steele* v. *L. & N. Rd. Co.*, 323 U. S. 192, 202, 203."

The test of discrimination is the same, whether under the National Labor Relations Act and the Railway Labor Act or under the reemployment statute, as the court determined by its grant of relief under the reemployment statute and by its discussion primarily of veterans' reemployment cases in this connection—the *Campbell, Whirls, Fishgold* and *Gauweiler* cases. The quotation above was the holding of the court, the necessary basis for its further conclusion that the contested provision was invalid because not based on a relevant difference among the employees. (Since the reemployment statute itself requires the difference between returning veterans and those who remained continuously in their civilian employment to be treated as irrelevant, this latter part of the *Huffman* decision is of no concern here.)

Thus the Court of Appeals for the Sixth Circuit holds that illegal discrimination occurs if there is widespread disadvantage to one group in favor of another, regardless of hostile motive or intent. On the other hand, the court below specifically rejected this test and held that returning veterans may suffer a disadvantage greater and more widespread than any other group, and a corresponding advantage may go to the employer in the form of savings or to other employees in the form of increased vacation pay, so long as there is no intent to discriminate. As the court said:

"We have not overlooked plaintiffs' contention that even though no opposing affidavits were filed by them, an issue of fact was raised by the allegations of their complaint. We think this contention is without merit. There is no allegation in the complaint that the agreement between the defendant and the union was made in bad faith and no allegations of fact which, in our view, could form the basis for any legal discrimination. The nearest approach is the allegation, 'By this device, nearly every veteran returning to General Motors' employ was deprived of vacation pay in 1946 because of his prior absence in military service,' and that plaintiffs 'were the victims of a unique rule discriminating against employees in the military service.' 'By this device' in the first quote and a 'unique rule' in the second quote refer to the agreement by which the earnings for 1945 were used as the basis for vacation pay in the year 1946. These allegations, in our view, raise no genuine issue as to a material fact. We suppose that none would disagree but that plaintiffs and other veterans were in numerous respects placed at a disadvantage when their lot is compared with that of their fellow employees who remained at home. Such disadvantages, however, are inherent in military service, although characterized as discriminatory are not discriminations for which the law affords a remedy. The discrimination, if such it be, asserted by the plaintiffs in the instant matter is not of

the character which the Act is designed to protect." (191 F. 2d at 912)

In the Sixth Circuit, the effects and operation of a provision, the burden it casts on a particular group of employees, is the measure of its validity; in the Seventh, these matters are irrelevant. Disputes of the kind giving rise to these cases will recur in future years, regardless of how long the veterans have been back in their civilian employment, as the nature of these disputes shows. The conflict in decision here is inescapable, and the question is far from moribund.

Because of this newly-developed conflict, petitioners urge the Court to reconsider the denial of certiorari and to grant the writ.

Respectfully submitted,

WEAVER & GLASSIE
THOMAS M. COOLEY II.
for Petitioners.

Certificate of Counsel.

I hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is grounded only upon the conflict between the decision below and a decision of a different Court of Appeals rendered subsequent to the submission of all briefs herein.

THOMAS M. COOLEY II.

See next page

SUPPLEMENT TO PETITION FOR REHEARING ON ORDER DENYING THE WRIT.

Subsequent to preparation of the petition for rehearing, a decision of the District Court of Minnesota was reported in the advance sheets of C. C. H. Labor Cases for March 27, 1952, and has just come to the attention of counsel for petitioners. This decision is *Rydberg* v. *Great Northern Railway Co.*, 21 Labor Cases ¶ 66,833 (decided December 13, 1951, Civil No. 2051 D. Minn., Third Division). It is directly contrary to the decision below on the escalator issue presented in the petition for certiorari.

The vacation pay provisions on the Great Northern, like that on practically all railroads, required that the employee render 160 days of compensated service in the preceding calendar year to be eligible for one week's vacation pay in the current year; to be eligible for two week's vacation pay, the employee must have rendered 160 days of compensated service in each of the five preceding years Rydberg was hired in 1943, worked steadily for 156 days and was then inducted. He returned in September 1944, missed little or no work, and worked 99 days that year. In 1945 and each succeeding year, he worked over 160 days. He claimed one week's vacation pay in 1945, and two weeks in 1949, on the theory that only his absence in military service prevented him from meeting the requirement of 160 days' compensated service in the preceding years.

The railroad moved to dismiss on the ground the complaint failed to state a claim upon which relief could be granted. In denying the motion, the court said:

> "The court's attention has not been directed to any pertinent decision by the Court of Appeals of the Eighth Circuit, and the court has found none. The difference in the conclusions arrived at in the Second (*Dwyer* and *Siaskiewicz* cases) and Third (*Mentzel* and *MacLaughlin* cases) Circuits suggests an element of speculation as to what is the appropriate disposition of the question of vacation pay in the cases at bar. All

doubts should be resolved with a thought to protecting the veteran, and as required by a liberal construction of the Act in question. (Citing *Fishgold* and *Karas* v. *Klein*, 70 F. Supp. 469)

"Motions to dismiss should not be granted unless it appears to a certainty that plaintiffs would be entitled to no relief under any state of facts in support of the claim set forth in the complaints (Citing *Sparks* v. *England*, 113 F. 2d 579 C.A. 8; *Turner* v. *U.S. Gypsum Co.*, 11 F.R.D. 545; and *R. O. Stenzel & Co.* v. *Department Store Package, etc.*, 11 F.R.D. 362) Thoughtful consideration is convincing that the plaintiffs have stated a claim justifying recovery upon required proof. The motion to dismiss in each case is denied, without prejudice to its renewal at trial.

The requirement of 160 days of compensated service is obviously much stronger in the employer's favor than the computation in the present case fixing the amount of vacation pay as a percentage of prior year's earnings; for the latter computation does not in any sense make the 1946 vacation pay compensation for work in 1945. (See note 1, page 6 of the original petition herein.) Yet the Minnesota court applied the escalator principle and held that plaintiffs had stated a cause of action, whereas the Seventh Circuit rejected the principle and dismissed petitioners' complaint on the ground it stated no cause of action. And even without an exhaustive examination of all the authorities, the conflict in decisions of Courts of Appeal was plain to the Minnesota court, for the court stated that "the difference in the conclusions arrived at by the Second and Third Circuits" warranted refusal to dismiss, in the absence of an authoritative decision in the Eighth Circuit.

A similar and confusing choice of conflicting precedents will continue to confront lower courts so long as this Court has not spoken. Only in the Circuits where the Court of Appeals has decided the point are the results predictable, and among these Circuits the principles are contradictory and the results opposing. Outside them, there can be no

predictability or uniformity, in vacation pay or other matters embraced in the escalator principle, until this Court has determined the correct rule of law.

THOMAS M. COOLEY II.

Certificate of Counsel.

This supplement to the petition for rehearing is based on a case reported only since the petition for rehearing was prepared. The petition for rehearing is limited to (a) the conflict between this case and the decision below and (b) the newly-developed conflict between Courts of Appeal set forth in the petition for rehearing, and is not submitted for purposes of delay.

THOMAS M. COOLEY, II,
Counsel for Petitioners.

FILED
APR 11 1952
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 533

WALTER H. FOSTER, ET AL.,
Petitioners,

vs.

GENERAL MOTORS CORPORATION,
Respondent.

RESPONDENT'S RESPONSE TO PETITION FOR REHEARING.

HUBERT HICKAM,
THOMAS M. SCANLON,
JERRY P. BELKNAP,
Attorneys for Respondent.

BARNES, HICKAM, PANTZER & BOYD,
1313 Merchants Bank Building,
Indianapolis 4, Indiana,
Of Counsel.

THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 533.

WALTER H. FOSTER, ET AL.,

Petitioners,

vs.

GENERAL MOTORS CORPORATION,

Respondent.

RESPONDENT'S RESPONSE TO PETITION FOR REHEARING.

The petition for rehearing, as supplemented, is based on two decisions claimed to conflict with the decision under consideration here. The first such decision cited is *Huffman* v. *Ford Motor Co.* (C. A. 6, March 3, 1952), 21 C. C. H. Labor Cases, ¶ 66,799. That case was decided by a split court, and admittedly was a case *sui generis*. The bargaining contract there involved a seniority provision which gave all veteran employees seniority credit for their period of service in the Armed Forces regardless of whether the veteran had been an employee of Ford Motor Company when he went into the service or not. The contract was thus claimed and held to discriminate against veteran employees of Ford who had been in its employ before entering service and in favor of veterans with long service in the

Armed Forces who came into Ford's employ for the first time after the war. The majority stated the question presented thus:

> "* * * The question squarely presented is whether the union and management can by contract create preferential seniority in men not employed when they entered the armed services as against men, also veterans, who were employed when they entered the armed services." (21 C. C. H. Lab. Cas. 81,002.)

The court then discussed the fact that the provision was embodied in a collective bargaining contract and indicated that that fact was pertinent only if the contract provision was made for the protection of the union as a whole. The court then concluded:

> "* * * Where the discrimination arises is between veterans, like Huffman, who were employed, left their employment to enter the armed services and were reemployed, in conformity with the statute, and veterans not employed prior to war service. All such veterans who subsequent to June 21, 1941, have served a longer time in the armed forces than Huffman and those similarly situated are given *a preferential seniority under a contract provision which has no relevance to terms and conditions of work or the normal and usual subjects of contracts between union and employer.* * * *
>
> "While, as pointed out in *Aeronautical Lodge* v. *Campbell, supra,* there are variations in the use of seniority, such as plant seniority, shop seniority, seniority conditioned upon existence of a probationary period of employment, etc., we are cited to no case which approves the creation of seniority rights in a collective bargaining contract upon the basis of acts done or service rendered prior to entering upon the employment in which the seniority is claimed. We think this is 'superseniority' just as the seniority claimed in *Trailmobile Co.* v. *Whirls, supra,* was superseniority. It penalizes Huffman for working for Ford before his military service.

"Under the uncontradicted facts the seniority system as to Huffman and those similarly situated is discriminatory. Plainly a contract which, in case of layoff, prefers men without experience over men with experience, no other facts appearing and no other valid reasons for preference existing, is discriminatory. When an employee who entered the Ford plant in 1945 is retained in layoffs over Huffman, who entered in 1943, Huffman is discriminated against." (21 C. C. H. Lab. Cas. 81,003-4.)*

This review of the facts of that case amply demonstrates that it has no applicability here. Here it is petitioners who seek to claim a sort of superseniority by being given a preferred position in relation to vacation pay over nonveterans on furlough or leave of absence. The attacked provision of the collective bargaining agreement here was negotiated at length by the company and the union in the course of negotiations to end a long strike. As the court below described the situation:

"* * * A strike had long been in progress at the time such negotiations were commenced and carried on. Both the defendant and the union were charged by law, National Labor Relations Act, 29 U. S. C. A. § 151, *et seq.*, to bargain in good faith in an attempt to reach a satisfactory agreement. Defendant made numerous proposals which, if they had been accepted by the union, would perhaps have been more favorable to employees on a furlough or leave of absence. Such proposals, however, were rejected by the union.

"Certainly there is no basis on the undisputed facts to argue that the defendant did not bargain in good faith, and the fact that the union rejected the proposals as made by the defendant and insisted on a proposal, subsequently agreed to by the defendant, by which the earnings for 1945 were made the basis for vacation pay does not show that the union acted in bad faith. And this is so notwithstanding that such pro-

*All emphasis our own unless otherwise indicated.

> posal was less favorable to employees on a furlough or leave of absence than might have otherwise been obtained. After all, a union as an authorized bargaining agent no doubt is legitimately interested in obtaining the best possible contract for its members as a whole, and with numerous diversified interests among its members, especially, where its membership is large, there is nothing strange or unnatural if some segments of its membership are placed at disadvantage when compared with others. The strike had been in progress for 113 days, and it evidently was to the interest of both the defendant and its employees that it be terminated." (191 F. 2d 911; R. 116.)

As has been noted, the claim advanced in the present case has been presented to two different Courts of Appeals and has been found to lack merit. There is nothing in the ruling of the Court of Appeals for the Sixth Circuit in *Huffman* v. *Ford Motor Co.* that requires a different result.

In their Supplement to Petition for Rehearing, petitioners cite *Rydberg* v. *Great Northern Ry. Co.* (D. C. Minn., Dec. 13, 1951), 21 C. C. H. Labor Cases ¶ 66,833, as having some bearing on the application of the escalator principle here. The facts involved there are not set forth in the opinion. The actual decision was merely to deny without prejudice a motion to dismiss. It is thus difficult to determine just what principles the court was applying. It is worthy of note that in so far as the court discussed a supposed "difference in the conclusions arrived at in the Second and Third Circuits," the court overlooked the Third Circuit's decision in *Dougherty* v. *General Motors Corp.* (C. A. 3, 1949), 176 F. 2d 561, cert. den., 338 U. S. 956, which is the complete parallel to the decision of the Court of Appeals for the Seventh Circuit here involved. Under the circumstances, there is nothing in *Rydberg* v.

Great Northern Ry. Co. that can be claimed to be contrar to the decision here in question.

The petition for rehearing is without merit and shoul be denied.

Respectfully submitted,

HUBERT HICKAM,
THOMAS M. SCANLON,
JERRY P. BELKNAP,
Attorneys for Respondent

BARNES, HICKHAM, PANTZER & BOYD,
1313 Merchants Bank Building,
Indianapolis 4, Indiana,
Of Counsel.